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CHARLES ELMORE

In the

Supreme Court of the United States

October Term, 1950

No. 696

Park-In Theatres, Inc.,
petitioner

vs.

Paramount-Richards Theatres, Inc.,
Paramount-Richards Enterprises, Inc.,
Kennington-Richards Enterprises, Inc.,
Richards Ehrlich Enterprises, Inc.,
Saenger Theatres, Inc.,
Capitol Theatres, Inc.,
United Theatres, Inc.,
respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

and

Brief in Support Thereof

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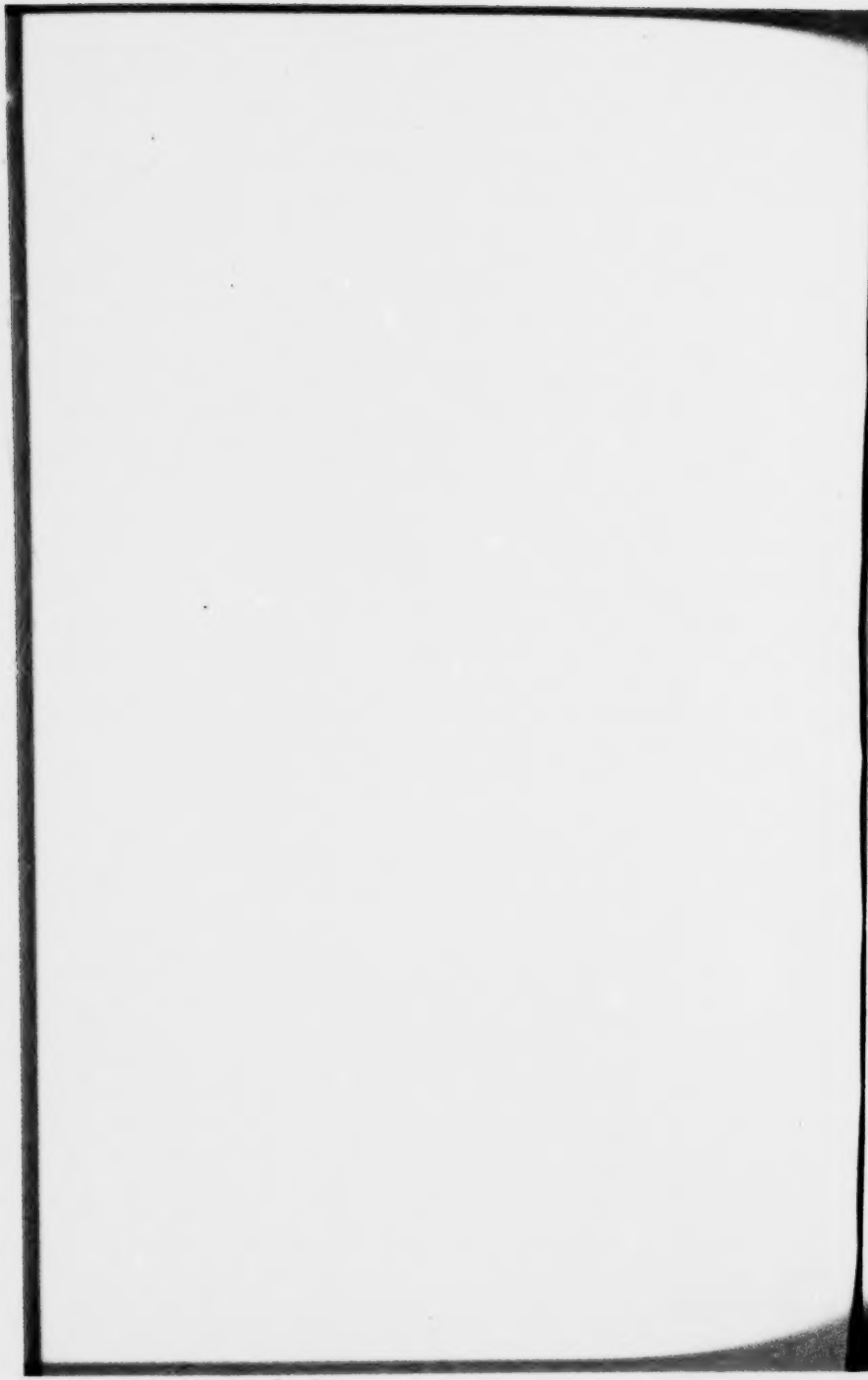

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Saenger Theatres of Texas, Inc.,
Capitol Theatres, Inc.,
United Theatres, Inc.,
respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Park-In Theatres, Inc. respectively prays for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review the Judgment entered by that Court on December 13, 1950 (R. 199);—petition for rehearing (R. 202-216) having been denied on January 24, 1951 (R. 217).

Transcript of Record in the case, including the proceedings in the Court of Appeals, is furnished herewith in accordance with Rule 38 of the Rules of this Court. Pages 1 to 9 of the Record contain the docket entries in the District Court.

The *per curiam* Opinion of the Court of Appeals (185 F.2d 407) appears in the Record at page 198.

The two Opinions of the District Court (81 F.Supp. 466 and 90 F.Supp. 730) on the merits of the defense of "patent-misuse" at bar appear in the Record at pages 11 to 27 and 97 to 109.

The Opinion of the District Court barring petitioner from examining respondents' officers under Rule 26 on the matter of the "patent-misuse" charged in their Motions, is not reproduced in the Record but reported at 7 F.R.D. 723.

The Opinion of the District Court confirming petitioner's right to file its Amended Complaint (R. 39-68) at bar under Rule 15-a without leave of court, is not reproduced in the Record but is reported at 9 F.R.D. 267.

Summary and Short Statement

1) Petitioner, Park-In Theatres, Inc. (a New Jersey corporation) and owner and licensor of Hollingshead patent 1,909,537, issued on May 16, 1933 on "DRIVE-IN THEATRES", filed suit against respondents (corporations of Delaware) on October 18, 1947. Only the first three of the above-named defendants are respondents herein.*

2) The verified (R. 85) Amended Complaint (R. 39-68) *at bar* was filed as of right under Rule 15-a (9 F.R.D. 267) and superseded, *nunc pro tunc,* the original Complaint (R. 189-197) after the District Court, in its 1948 Opinion (R. 11-27 and 81 F.Supp. 466) *deferred* disposition of the defense of "patent-misuse" raised by respondents' Motion (R. 9-10) under Rule 12-b(6) to dismiss the original Complaint as to both causes of action, *ex contractu* and *ex delicto,* for alleged misuse of the

* Defendants "Richards-Ehrlich" and "Saenger" were never served and never appeared, while the defendants "Capitol" and "United", though having voluntarily appeared through their attorneys (R. 116 & 118) and having participated for a year and a half in motions and arguments going to the merits (R. 9-10 and 87-88), were thereafter dismissed on their Motion (R. 91) for lack of service upon them (R. 94-97 & 109).

licensed patent "to drive competiting business out of the market" (R. 10);—the District Court's deferral of disposition of this defense of patent-misuse being "until subsequent proceedings may produce facts which will require the exact application of the *Lockwasher*[1] and *McCullough*[2] cases, or the non-production of facts showing existing competition with the patented device involved, may give rise to a consideration of the application of the *Lockwasher* and *McCullough* cases *un*connected with such facts";—the District Court then recognizing (but in its Opinion at R. 97-109 handed down two years later, apparently overlooking) that there is no misuse of a patent or any use contrary to public interest unless competition has been limited, discouraged or suppressed or the patent monopoly enlarged (R. 27), and giving respondents thirty days to answer the original Complaint (docket-entry 18 at R. 2), which answer was never filed because respondents renewed their motions (R. 92 3).

3) The Amended Complaint (R. 39-68) at bar contains two causes of action *ex contractu* between citizens of different states (with the amount in controversy in each cause in excess of the jurisdictional amount), namely, the *First* and *Third*—the *First Cause of Action* for the recovery of royalties under the patent-agreement (paragraphs 5-50 at R. 45-63) and the *Third Cause of Action* for failure adequately and in good faith to commercialize and promote the invention under the patent-agreement (paragraphs 5-49 and 55-57 at R. 45-65)—and contains two causes of action *ex delicto,* namely, the *Second* and *Fourth* —the *Second Cause of Action* being for combination and conspiracy in violation of the Anti-Trust Laws (R. 48) by the trade practices condemned in *United States* vs. *Paramount Pictures, Inc. et al* (66 F.Supp. 323, and 334 U.S. 131), *United States* vs. *Griffith et al* (334 U.S. 100), and *United States* vs. *Schine Chain Theatres, Inc. et al* (334 U.S. 110), suppressive of the commercial use by peti-

[1] National Lockwasher Co. *vs.* Geo. K. Garrett Co., 137 F.2d 255 (CCA 3)

[2] McCullough *vs.* Kammerer Corp., 166 F.2d 759 (CCA 9)

tioner and others of the invention of the patent-in-suit (paragraphs 5-49 and 52-53 at R. 45-64), and the *Fourth Cause of Action* for patent-infringement (paragraphs 5-49 and 55-56, at R. 45-63 & 65-66).

4) The Judgment of the Court of Appeals (R. 199), for the review of which certiorari is sought, affirmed, *per curiam* (R. 198 and 185 F.2d 407) the District Court's Summary Judgment (R. 110) and Order (R. 110-1) dismissing the aforesaid two causes of action *ex contractu* in the Amended Complaint, upon the District Court's 1950 Opinion (R. 97-109 and 90 F. Supp. 730) as well as upon the District Court's aforesaid 1948 Opinion that the agreement-in-suit constituted such misuse of the licensed patent as rendered the agreement unenforceable;—without answer filed and without trial and after the District Court *denied (7 F.R.D. 723)* plaintiff all opportunity either to prove the matters alleged in the Complaint or to disprove the claimed "patent-misuse" (*inferred* by respondents' Motions and by the District Court's subsequent decision) by depositions of respondents' officers under Rule 26 of the Rules of Civil Procedure.

5) The agreement-in-suit is Exhibit 3 (R. 69-74) dated November 20, 1940 and is now between petitioner and one or more of the respondents,* is a territorially *exclusive* agreement, and has *annexed* to it a blank *un*executed territorially *exclusive* license-form of Exhibit 3A (R. 75-82) which paragraph 1 of the aforesaid agreement-in-suit (Exhibit 3) contemplated "*may*" *futurely* be entered into between petitioner and the assignees of Elwood R. Clay (R. 69);—it having been "the then understanding of the par-

*The aforesaid agreement-in-suit (Exh. 3) was entered into between petitioner and one Elwood R. Clay, who shortly thereafter assigned his interest in said agreement to one of the respondents, *Paramount-Richards Enterprises, Inc.* (by the assignment of Exhibit 4, at R. 83, acknowledged by Exhibit 5, at R. 83);—Paramount-Richards Enterprises, Inc. being a Delaware corporation organized for the purposes of the agreement-in-suit and believed to be a holding company for some of the other respondent corporations (although petitioner has not yet had any opportunity to inquire into the inter-company relationships between respondents, with the aid of the discovery Rules).

ties" as set out in the Amended Complaint "that one or more separate corporations would be formed and incorporated . . . to become a licensee or licensees for one or more drive-in theatres of patent 1,909,537 and that each such corporation was to own or operate one or more such drive-in theatres, and that the operation of the drive-in theatre would be such corporation or corporations sole business and only reason for existence" (R. 53).

6) Each of the licensee-respondents is a *"straw"* corporation thereafter properly organized solely for the purpose of becoming a licensee and owning and operating one *drive-in theatre of patent 1,909,537,* which drive-in theatre is its sole business and the only reason for its existence (R. 53) and *is its place of business,* and it sells no product or commodity whatever under the agreement-in-suit, but only sells admissions to its place of business (paragraph 32 of Amended Complaint at R. 57).

7) The defense of "patent-misuse" sustained below (on Motions and without trial) was directed solely to *paragraph 3* (R. 76) of the unexecuted blank license-form of Exhibit 3A which is in the words:

> "3. Licensee covenants and agrees that it will not either directly or indirectly promote or aid the making, construction, use or operation of any drive-in theatre not licensed by Licensor."

Conceding that none of the respondents had ever executed the license-form of Exhibit 3A containing the questioned *paragraph 3,* respondents contended (on their sustained Motions for Summary Judgment and to Dismiss) that, while the above-quoted paragraph 3 of the *un*executed license-form does not expressly or by its terms refer to automobile-movie-theatres not covered by petitioner's licensed patent nor to competitive unpatented or non-infringing automobile-movie-theatres and while the questioned phrase "any drive-in theatre not licensed by Licensor" in said paragraph 3 of course *does* comprehend infringing drive-in theatres, nevertheless this bit of bare contract-language should be construed to *also* include

within its scope *un*patented or *non*-infringing automobile-movie-theatres, and that such inclusion constituted the "patent-misuse" which respondents contended on their Motions was designed to or would "drive competing businesses out of the market" (R. 10).

8) In support of their motions (R. 92-3) respondents filed a number of affidavits (R. 29-39 & 153-180) to the effect that some 20 or more automobile-movie-theatres, in various places outside the geographical area to which the agreement-in-suit was limited, were built and put into operation commencing about 1946,* and thereafter, including the period subsequent to the filing of this suit, and that such automobile-movie-theatres did not come within the scope of petitioner's Hollingshead patent 1,909,537 and yet were generally called "drive-in theatres", and another affidavit (R. 121-3) showing that the identical contract-provision (namely, a clause like paragraph 3 of the unexecuted license-form of Exh. 3A at bar) had been a part of other licenses issued by petitioner which had been executed and in force from time to time, including petitioner's 1937 license-agreement with Loews Drive-In Theatres, Inc. (cancelled in 1938) which was adjudicated in *Park-In Theatres, Inc.* v. *Loews Drive-In Theatres, Inc.* (70 F.Supp. 880) wherein that identical contract-provision (there paragraph 4) was attacked on a defense of "patent-misuse", and in which suit the District Court, upon a full trial, held that it did *not* have any patent-monopoly-extending *nor* any competition-restraining effect and and did *not* constitute a "patent-misuse".[2]

9) Petitioner contended contrariwise:

There having been *no* automobile-receiving outdoor motion-picture theatres (*of any kind*) in existence or known *at that time*, other than that of petitioner's Hollingshead patent (paragraphs 13-15 of amended Complaint at R. 49-50), and the term "drive-in theatre" having been

* six and more years after the date of the agreement-in-suit and thirteen or more years after the issuance of petitioner's Hollingshead patent 1,909,537

[2] The District Court's decision in *Park-In* v. *Loews, supra,* was reversed on *other* grounds not going to and not disturbing the District Court's decision on the defense of "patent-misuse" (174 F.2d 547; 1 Cir.)

coined by Hollingshead as the name for the subject-matter of his patent (R.50), the quoted phrase was only intended to mean an automobile-receiving-and-aiming outdoor motion-picture theatre like that of the Hollingshead patent but not licensed by licensor, namely, any infringing device (paragraph 29 of Amended Complaint at R. 56) and that the questioned *paragraph 3* of the license-form of Exhibit 3A was merely a prohibition against licensee's aiding and abetting infringements (as, for instance, by lending to others petitioner's confidential working-drawings of *paragraph 2* of the license form [R. 76] and of paragraph 24 of the Amended Complaint [R. 54]). Furthermore, even if the above-quoted language were given the meaning contended for it by respondents, there was yet no misuse of the licensed patent because it was true not only of respondents but of the entire industry that every drive-in theatre (and most indoor theatre houses) are separate corporations having no other business or reason for existence except the one drive-in theatre, and that therefore such contract-provision would be inherently incapable, *in fact,* of either extending the monopoly of the patent or restraining the competition, because anybody, including the stockholders of licensee-corporations, could build as many more patented or unpatented automobile-movie-theatres as there are available pieces of land upon which to build them and corporate charters obtainable from the 48 states;—each licensee-corporation being nothing more nor less than a *one-theatre liability-limiting corporate-shell* used to represent a single unit or specimen of the invention of the Hollingshead patent;—the granting clause 1 (R. 76) of the proposed but *un*executed territorially-exclusive license-form of Exhibit 3A being expressly "for the construction and operation of *one* outdoor drive-in theatre" (R. 76) and paragraph 5 of the license-form (R. 77) requiring a separate license for each *additional drive-in* theatre which the licensee may desire and was given a free right to build and operate.

10) On May 8, 1950 the District Court handed down its second Opinion (90 F.Supp. 730) on "patent-misuse"

(R. 97-109) granting respondents' Motion for Summary Judgment as to the *First Cause of Action* for the recovery of royalties, and granting respondents' Motion to Dismiss as to the *Third Cause of Action* for breach of contract by non-exploitation of the invention;—and held that because (six years after the date of the agreement-in-suit) non-infringing automobile-receiving motion-picture-exhibition places came into being, therefore the phrase "any drive-in theatre not licensed by Licensor" in paragraph 3 of the unexecuted territorially-exclusive license-form of Exhibit 3A must be construed to have been intended also to comprehend such non-infringing theatres (notwithstanding the uncontroverted allegations of fact to the contrary in the verified and unanswered Amended Complaint: R. 50, 56), and further held that the subsequent existence of such non-infringing theatres showed that there was competition to be restrained, notwithstanding that the very subsequent existence of a large number of such non-infringing theatres was a strong indication, if not proof, that the questioned contract-provision did not *in fact* have any restraining influence upon the growth of such non-infringing theatres, and notwithstanding that there was no apparent way* in which the questioned contract-provision could ever restrain the free and widespread building and use of non-infringing theatres by all who would naturally be in a position to build and operate any additional theatres;—each corporate licensee being nothing more than a liability-limiting single-purpose straw corporation for holding the investment in *one* theatre and by industry-custom not intended to build and operate any other theatres, and non-licensees (including the stockholders of licensees) being entirely free to build and operate as many non-infringing theatres as they had money, land and corporate charters for.

11) Corresponding *final* Order and a Summary Judgment of dismissal were entered (R. 109-111); from which a timely appeal was taken (R. 111).

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* and neither respondents nor the Courts below have suggested any way.

12) The Court of Appeals for the Third Circuit affirmed the District Court's final Order and Summary Judgment of dismissal, in a *per curiam* Opinion at page 198 of the Record (185 F.2d 407).

13) Within the time-extension granted by the Court of Appeals, petitioner filed a timely Petition for Rehearing (R. 202-216) to the Court of Appeals, which was denied on January 24, 1951 (R. 217) without opinion.

Jurisdiction

1) Decision of the Court of Appeals was entered on December 13, 1950 (R. 198).

2) A Petition for Rehearing was denied by the Court of Appeals on January 24, 1951 (R. 217).

3) The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

4) Cases believed to sustain the jurisdiction are: Rule 38, Section 5(b) reading:

> "Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Duplate Corp. & Pittsburgh Plate Glass Co. v. *Triplex Safety Glass Co. of North America,* 298 U. S. 448;

Sheldon v. *Metro-Goldwyn Pictures Corp.,* 309 U. S. 390;
Bacardi v. *Domenech Treasurer,* 311 U. S. 150;

Crest Specialty v. *Trager et al* (No. 446, October Term, 1950), certiorari granted February 26, 1951; U. S. (95 L.Ed. 405);

Automatic Radio Mfg. Co. v. *Hazeltine Research Corp.*, 339 U. S. 827 (decided June 5, 1950).

Questions Presented

The decision of the Court of Appeals for the Third Circuit (and the decisions of the District Court which it affirms, *per curiam*) presents the following questions:

1. What is the legal criteria or standard of "patent misuse" as a defense to an action *ex contractu* or *ex delicto;*

(a) is it just any *theoretical* possibility of patent-monopoly-enlargement or competition-restraining effect which is not spelled out by the terms of the questioned contract-clause (and not borne out by or correlated to a decade of industry-facts), but which may be inferred from the *bare** contract-language, *in vacuo,* as held by the Courts below,

or

(b) is it a matter of intent and realistic correlationship between contract-language and industry-facts and subject-matter of the licensed patent and the *actual* effect of such contract-language upon competition of unpatented devices, as held, contrariwise, in the following cases:

Park-In Theatres, Inc. vs. Loew's Drive-In Theatres, Inc. 70 F.Supp. 880, 886-7 (reversed on other grounds not going to the matter of patent misuse at 174 F.2d 547; 1 Cir., and certiorari denied at 338 U.S. 822-3 and 896),

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* "The defense of misuse of patent, like other unclean hands defenses, is not, as defendant seems to think, a matter of the letter or *bare bones facts;* it is a matter of their spirit, or intent with which they are done. The judge may not, on motion for summary judgment, draw fact inferences as to plaintiff's purpose or intention in respect to obtaining a monopoly. Such inferences may be drawn only on trial." *Gray Tool Co.* vs. *Humble & Refining Co.*, 186 F.2d 365, 367 (5 Cir.) decided January 19, 1951

Gray Tool Co. vs. *Humble & Refining Co.* 186 F.2d 365, 367 (5 Cir.) decided January 19, 1951,

Automatic Radio Mfg. Co. vs. *Haseltine Research Corp.*, 339 U.S. 827 (decided June 5, 1950)

2) Is it a "patent-misuse" or against public policy, making the agreement-in-suit unenforceable, to provide

> *in territorily exclusive license-agreements excluding licensor from the use or licensing of the invention within the licensed territory and relegating licensor merely to a small percentage of the licensee's income from the public's use of the licensee's single licensed specimen of the patented device, a drive-in theatre, and requiring licensor to supply to licensee working drawings (for the building of such drive-in theatre) appropriate for the topography of licensee's land,*

that the licensees,

> *each organized only to become a licensee and to build, own and operate only one specimen of the patented device, and licensed only for such one specimen of the patented device, namely, one drive-in theatre, and inherently not engaged nor intended to be engaged in the manufacture for sale or in the sale of the patented device or of any other device or product, but engaged solely in the public exhibition of motion pictures in the patented drive-in theatre,*

shall not promote or aid the building and operation of other devices of the same general class, namely other drive-in theatres, not covered by the licensed patent?

This question is presented on the assumption, *arguendo* (and we believe and submit contrary to the well-pleaded and uncontroverted facts set out in the verified amended complaint) that the license-agreement of Exhibit 3A (R. 75-82) was either executed or if unexecuted then nevertheless to have the same force and effect as though executed, and that the above-

quoted paragraph 3 (R. 76) thereof has (or was intended to have) the meaning contended for it by respondents and assumed by the Courts below, namely, that the words "any drive-in theatre not licensed by Licensor" was intended to mean *any outdoor motion-picture theatre in which the patrons viewed the motion-picture show from the seats of their automobiles through the windshields or windows thereof,* irrespective of the construction or structure of such theatre and including therefore theatres of this broad class which are *not* covered by the licensed patent.

3) Do the accumulated decisions finding "patent-misuse", including the Lockwasher[1] and McCullough[2] cases, properly apply to or control a licensing situation where the subject matter of the patent and the facts and circumstances of the industry which exploits it (under license or otherwise), *all without precedent or parallel in any prior decision finding "patent-misuse",* make it practically impossible for the questioned contract-provision to have any patent-monopoly-broadening or competition-suppressing effect, irrespective of the interpretation placed on or inferences drawn from the *bare* language *(in vacuo)* of the questioned paragraph of the contract?

4) Should a cause of action *ex contractu* be dismissed on motion for summary judgment for "patent-misuse", after the District Court barred plaintiff from taking the depositions of the defendants' officers on the issues raised by the motion, where the summary judgment is based upon fact-inferences drawn as to the meaning and intent of the *bare* contract-language and as to patent-monopoly-broadening or competition-suppressing effects of such *bare* contract-language;—which fact-inferences fly squarely in the face of the well-pleaded allegations set out in the verified and unanswered complaint?

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[1] *National Lockwasher Co.* vs. *Geo. K. Garrett Co.,* 137 F.2d 255 (CCA 3)

[2] *McCullough* vs. *Kammerer Corp.,* 166 F.2d 759 (CCA 9)

Reasons Relied Upon for the Allowance of This Petition

It is believed that the writ should be granted in this case for the following reasons:

1) The decisions below create broad uncertainty as to the law, criteria or standard applicable to the now popular defense of "patent-misuse" occupying much time of the Federal Courts, namely whether it can sustained by mere *inference* from bare contract-language irrespective of and wholly *disassociated* from the underlying and historical facts which may negative even the possibility competition-suppression, or whether it must be sustained a showing of some cogent operating connection between the contract-language and some likely, appreciable or significant restraint of actual or genuinely potential competition.

2) The decisions of the Court of Appeals affirming the summary judgment and order dismissing the causes of action *ex contractu* of the Amended Complaint because of unspecified* "patent-misuse" *inferred* by the lower Court from the bare language of the agreement-in-suit,

> in disregard of the well-pleaded facts set out in the unanswered verified Amended Complaint showing that there was no extension nor any possibility of extension or enlargement of the patent monopoly by reason of the questioned provision of the agreement-in-suit,

is believed to be contrary to and in conflict with the decisions of this Court as well as of other Courts of Appeal.

3) The questions presented by this case are novel and without precedent in any reported case, in that the Court of Appeals has affirmed a wholly *unrealistic* "patent-misuse" decision;—*the first decision finding "patent-misuse" in a situation,* peculiar to the subject-matter of the licensed patent and to the industry-pattern and custom,

*neither respondents nor the Courts below have suggested just how the questioned contract-provision (irrespective of the interpretation placed on its bare language) could suppress competition or enlarge the patent-monopoly [illegible] and the nature of the invention at bar.

where neither licensor nor licensee manufactures anything for sale nor sells any device, product of commodity (but sells only a service, namely, admissions to public exhibitions of motion-pictures) *and where the licensees are separate liability-limiting "straw" corporations which had no prior existence and were formed solely for the purpose of becoming a licensee and building and operating a single unit or specimen of the patented device, and where such patented device is merely the licensee's place of business and each corporate licensee is merely the legal repository of title to one unit of the patented device and the legal conduit through which the income thereof is taken in and the expenses thereof disbursed;*—which situation inherently precludes any real possibility of the questioned contract-language affecting any patent-misuse **either** *"driving competing businesses out of the market"* as claimed in respondents' first Motion to Dismiss (R. 9-10) for patent-misuse **or** comprising *"a suppression of competition injurious to the public interest and an unlawful attempt to extend plaintiff's monopoly beyond the scope of his lawful grant"* as claimed in respondent's Motion for Summary Judgment (R. 93).

4) The questions presented by this Petition are of great public importance and affect not only the parties to this litigation but also a substantial portion of an entire drive-in theatre industry which has come into being and has grown to tremendous size, based upon and engaged in the commercial exploitation of the invention of the licensed patent.

Wherefore, it is respectfully submitted that this Petition for writ of certiorari to the Court of Appeals for the Third Circuit should be granted.

PARK-IN THEATRES, INC.,
petitioner

by
LEONARD L. KALISH
ARTHUR G. CONNOLLY
its attorneys

Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The decision of the Court of Appeals for the Third Circuit now sought to be reviewed was entered on December 13, 1950 (R. 198) and its decision denying petition for rehearing was entered on January 24, 1951 (R. 217).

Jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code and Section 5(b) of Rule 38 of this Court.

Statement of the Case

1) To avoid repetition, reference is hereby made to the summary and short statement on pages 2 to 9, *supra*, of the petition.

2) *The subject matter of the licensed patent* is the *now* well-known *"drive-in theatre"* which consists, *inter alia*, of an elevated screen and a successive series of depressed arcuate driveways and elevated arcuate rows of car-aiming ramps[1] alternating with each other (in front of the screen);—the car-aiming ramps being so backwardly inclined (that is, with the front of the car-aiming ramp higher than the rear thereof) and being so arranged in relation to the intervening driveways that the cars may be driven from the driveways onto the car-aiming ramps, thereby tilting the car at an angle to aim it at the screen, with this car-aiming angle variable or adjustable for different heights of wind-shields and car-seats and for the different sizes of their occupants, by moving the car slightly forward or rearward on the backwardly-inclined car-aiming ramp, thereby to adjust the car-aiming angle

[1] called "stallways" in the licensed patent

so that the vertical angle-of-vision of the car-occupants will register with and encompass the vertical dimension of the screen, with the lower sight-line clearing the roofs of the cars on the car-aiming ramps ahead;—each driveway being depressed below the front of the car-aiming ramp behind it, so that cars can drive in and out without passing through the line-of-vision of the car-occupants on the car-aiming ramps, and with successively rearward car-aiming ramps being successively higher in general elevation but having successively lesser angles of inclination, and electrical sound-reproducing means disposed in operative relation to the car-aiming ramps.

3) ***Paragraph 1*** of the license-form grants to licensee an *exclusive* territorial license for constructing and operating (but not for selling) only *one* drive-in theatre within a certain territory or geographic area to be defined and written into such license-form;—this grant excluding licensor and all others from the use or practice of the invention within the defined territory and barring licensor from ever granting any license to others* for the building and operation of any drive-in theatre within the stated territory;—thus making the license the full equivalent of a *sale* and divestiture of all of the patent-owner's rights in the patent, limited only to the stated territory, and making the patent-owner wholly and forever dependent upon the licensee for all compensation for or income from the so divested territorial-share of the patent, and *paragraph 7* of the license-form makes this a percentage of the licensee's tax-excluded box-office receipts.

4) *Paragraph 2* of the license-form requires licensor to furnish to licensee a set of grading plans or drawings, and the specifications therefor, for licensee's use in the building of the one licensed drive-in theatre within the licensed territory (R. 76), and, as set forth in the amended complaint, respondents "solicited and received the aid

* except only to the licensee or licensee's assignees or designatees under paragraph 5 (R. 77) and paragraph 17 (R. 80) of the license-form and paragraph 9-a of the main agreement (R. 73-74).

and assistance of petitioner's president and general manager, at petitioner's expense, in the selection of suitable sites in several southern states for the building and operation of drive-in theatres of patent No. 1,909,537, and also solicited and received the aid and assistance of petitioner's engineer in the preparation of dimensioned or "working" drawings to fit the terrain of each location or site finally selected, from which dimensioned or working drawings, so prepared by petitioner's engineer at petitioner's expense, the building contractors engaged by respondents did thereafter build the drive-in theatres at said locations or on said sites." (R. 54).

5) *Paragraph 13 of the amended complaint* alleges that prior to the filing date of the licensed patent, no motion-picture theatre of any kind or construction was ever built, used or operated in the United States or in any foreign country, in which the patrons viewed the motion-picture from the seats of their own automobiles (driven into the theatre), through the windshields thereof, and, prior to such filing date, the term or phrase "drive-in theatre" was unknown and did not appear in any publication in this or any foreign country, and that the term or phrase "drive-in theatre" was coined by Richard M. Hollingshead, Jr. (prior to said filing date) as the name for his invention which forms the subject-matter of his patent 1,909,537, (R. 49-50), while *paragraph 14 of the amended complaint* alleges that the licensed patent is the first patent ever issued in this or any foreign country on a motion-picture theatre in which the patrons view the picture from the seats of their own automobiles through the windshields thereof and that the Hollingshead patent No. 1,909,537 is a pioneer patent (R. 50).

6) *Paragraph 15 of the amended complaint* alleges that for many years after the filing date and after the issue date of Hollingshead patent No. 1,909,537, and until some time after December 31, 1940, there were no motion-picture exhibition places ever built or used in this or in any foreign country, other than the drive-in theatres of

patent No. 1,909,537, in which patrons viewed the motion-picture show from the seats of their own automobiles through the windshields thereof (R. 50), while *paragraph 16* alleges that long after the date of the agreement-in-suit, namely, some time after about the middle of 1946, others not in privity with petitioner built and put into operation outdoor motion-picture exhibition places, sometimes called "flatties", for receiving automobiles, which were just flat pieces of ground with a screen at one end, and *paragraph 17 of the amended complaint* alleges that the phrase "drive-in theatre" which Hollingshead had coined as a name for the subject-matter of the licensed patent was from about 1946 and thereafter appropriated by others not in privity with petitioner to designate such "flatties" (R. 51), and *paragraphs 18 and 19 of the amended complaint* allege that such "flatties" are inherently not competitive with the drive-in theatres of the licensed patent and that no such "flattie" has ever been built within competitive distance of a drive-in theatre of the licensed patent *because* such "flatties" are substantially *inferior to the drive-in theatres of the licensed patent* and *for that reason* could not successfully compete therewith.

7) *Paragraph 29 of the amended complaint* alleges that when the agreement-in-suit was entered into, the words "drive-in theatre" in the phrase "any drive-in theatre not licensed by Licensor" in *paragraph 3 of the blank license-form of Exhibit 3-A* "was generally understood and was intended and understood by the parties to mean a drive-in theatre of patent 1,909,537 and was *not* either intended or understood to mean any motion picture exhibition place not covered by patent 1,909,537 but in which patrons viewed (or tried to view) the picture from the seats of their automobiles, through the windshields thereof." (R. 57).

8) *Paragraphs 30, 31 and 32 of the amended complaint* allege that neither the agreement-in-suit nor the license-form annexed thereto contemplated the manufacture or sale of any goods, wares or merchandise or serv-

ice, by either petitioner or respondents, excepting only the building and operation of drive-in theatres, *in situ,* and that petitioner was never engaged and respondents were never engaged under the agreement-in-suit, or under the license-form annexed thereto (nor were ever intended to be engaged) in the manufacture or sale of any goods, wares, merchandise or service, excepting only the building and operation of drive-in theatres of the licensed patent, *in situ,* as aforesaid. (R. 57).

9) *Paragraph 33 of the amended complaint* alleges that the financial interests or real parties in interest, namely respondents' stockholders, were and remained at all times as free to build and operate outdoor motion picture exhibition places not covered by the licensed patent as they would have been had respondents never entered into the agreement-in-suit, irrespective of anything contained in the license-form of Exhibit 3-A annexed thereto and irrespective of whether such license-forms were ever executed by respondents (R. 57-58), and *paragraph 34 of the amended complaint* alleges that the real parties in interest, namely the stockholders who organized and owned the respondent straw-corporations were at all times since the date of the agreement-in-suit entirely free to organize and incorporate, or cause to be organized and incorporated, as many more separate corporations, to be owned by them, as they cared to bring into being from time to time for the purpose of building and operating outdoor motion picture-exhibition places not covered by the licensed patent, irrespective of anything contained in the agreement-in-suit or in the license-form annexed thereto, and *paragraph 35 of the amended complaint* alleges that the industry as a matter of fact has not been in any way deterred from building and operating outdoor automobile motion picture exhibition places not covered *by* the licensed patent, because film-producers and large exhibitors, including "Paramount Partners" or "Paramount Associates" other than respondents, who have never entered into any agreement with petitioner (and were therefore free of

and unhampered by any of the supposedly patent-abusive limitations or restrictions of the agreement-in-suit) never built any of the so-called "flatties", while others, as shown by *paragraphs 16 to 19 of the amended complaint* (R. 50-51) and by respondents many affidavits (R. 29-39 & 141-180) built *many* such "flatties" not covered by the licensed patent, without in any way being hampered in so doing by anything contained in the agreement-in-suit.

Specification of Errors

The following are the alleged errors of the Court of Appeals for the Third Circuit which will be argued before this Court:

The Court of Appeals erred in sustaining the District Court's summary judgment and order dismissing the *first* and *third* causes of action *ex contractu* of the amended complaint (on motion) on the ground that the agreement-in-suit and/or the license-form annexed thereto constituted such a misuse of the licensed patent as rendered the agreement-in-suit unenforceable.

Summary of Argument

Petitioner is motivated in presenting this petition for writ of certiorari because this case presents a novel and important question raised by the defense of "patent-misuse" in a *new* and large industry, namely the drive-in theatre industry, and effects a substantial part of that industry, and because the decisions below extend the doctrine of "patent-misuse" far beyond the farthest extensions thereof by the Courts of Appeals of any of the other Circuits;—into an area where the doctrine is stripped of all factual limitations or requirements and ceases to be realistic and invites a further increase in the fine-spun *theoretical* "patent-misuse" defenses with which the courts have been increasingly burdened in the past few years.

The Courts below have taken the "patent-misuse" doctrine of the *Lockwasher*[1] and *McCullough*[2] cases—derived from industry-situations where such doctrine has proper application because the subject matter of the patent was manufactured and rented or sold to the industry and the licensees represented a very significant portion if not indeed almost 100% of the country's pre-license productive capacity of *pre-existent* and theretofore widely used unpatented competitive devices[3]—and have unrealistically applied such doctrine to a situation where no competitive device, patented or unpatented, was ever known until years after the patent-in-suit and years after the contract-in-suit and where neither licensor nor licensee sells any goods, wares or merchandise nor indeed the patent device and the licensees individually and collectively cannot ever represent any significant portion of the "industry-capacity" of the country because they are mere legal-fiction entities having no pre-license existence and brought into being only to become a licensee and for the operation of a single unit of the patented device which becomes its place of business, and the lower Courts have thus erroneously transmuted the doctrine of the *Lockwasher* and *McCullough* cases into a non-discriminating catch-all formula which disregards the nature of the subject matter of the patent, the set-up of the industry, the straw-corporation character of the licensees and the practical impossibility of the contract-language actually working any appreciable (or even *de minimis*) restraint upon the competition of unpatented devices, and have thus created a great ***uncertainty as to the law, criteria or standard applicable to the now so frequently interposed defense of "patent-misuse"***, namely, whether such defense must be bottomed upon the realities of the subject matter of the patent and the historical industry-facts, or whether it is a simple magic formula (which can invariably be applied to any bit of contract-

[1] *National Lockwasher Co.* vs. *Geo. K. Garrett Co.*, 137 F.2d 255 (CCA 3)

[2] *McCullough* vs. *Kammerer Corp.*, 166 F.2d 759 (CCA 9)

[3] pre-license factories and production-machinery, sales-organization and long-established channels of distribution

language which need not even by its express terms spell out the restraint of competition in unpatented devices, but from a broadening construction of which such restraint may be inferred) in disregard of whether the nature of the subject matter of the patent and the set-up of the industry, *in fact*, make such competition-suppression possible or impossible.

Petitioner is further motivated in presenting this petition for a writ of certiorari in its belief that the unrealistic decisions below are probably in conflict with the decisions of this Court and of other Courts of appeals on what is a "patent-misuse" and on whether a defense of "patent-misuse" such as sustained below may properly be sustained on a motion for summary judgment without affording the plaintiff any opportunity to support the contrary allegations of his complaint or to disprove defendant's theory and inference of "patent-misuse", by depositions of witnesses (particularly the movants' officers) taken under Rule 26 of the Rules of Civil Procedure.

Argument

In the industry to which the licensed patent pertains, it is the well-nigh universal custom and practice (for practical and presumably proper business reasons) to form a separate "straw" corporation for each and every unit of the patented device (or unpatented), namely, for each and every drive-in theatre;—and respondents as well as other drive-in theatre owners and operators throughout the country, are separate holding corporations each owning and operating generally only one drive-in theatre.*

Unlike the situation in the *Lockwasher* and *McCullough* cases and unlike the situation in any other reported "patent-misuse" case, there was no "unpatented competitive device" in existence or known or suggested in any printed publication prior to the patent-in-suit or prior to the contract-in-suit, and, indeed, not until thirteen years after the issuance of the patent-in-suit and six years after the contract-in-suit did the first unpatented automobile-movie-theatre make its appearance and then, according to the Record (R. 51) such unpatented automobile-movie-theatres turned out *not* to be competitive, because so inferior to the drive-in theatre of the licensed patent that if built within competitive distance thereof, they could not command sufficient patronage to make them

* This was developed, *upon a full trial,* in *Park-In Theatres, Inc.* vs. *Loew's Drive-In Theatres, Inc.* (70 F.Supp. 880) wherein the identical contract-provision was held *not* to constitute a "patent-misuse" after all the facts were developed by pre-trial depositions and testimony in open court of the defendant, one of the large motion-picture-theatre owners and operators, who there asserted such defense of "patent-misuse" and who like the stockholders of the respondent-corporations at bar, had a separate corporation for each of his eleven or twelve drive-in theatres as well as for his conventional indoor theatre houses (of which he had a large number), and whose cross-examination both on deposition before trial as well as upon the trial showed that there was *no basis in fact* for the contention that the contract-provision here under attack had any effect of either enlarging the patent monopoly or restraining trade or commerce in any way, either in respect to goods, wares or merchandise or in respect to admissions to the drive-in theatre. The District Court's decision in *Park-In Theatres, Inc.* vs. *Loew's Drive-In Theatres, Inc., supra,* was reversed on *other* grounds (174 F.2d 547) not touching upon or disturbing that lower Court's decision on the defense of "patent-misuse" (certiorari denied at 338 U. S. 822 and 338 U. S. 896)

economically feasible (the operating costs, such as film-rental, payroll, etc., of the unpatented device not being sufficiently lower than that of the patented device to enable the owner of the unpatented device adequately to compensate for its structural and functional inferiority by the inducement of a substantially lower admission-price).

Unlike the *Lockwasher* and *McCullough* cases, neither licensor nor licensees at bar manufacture anything for sale, and indeed *neither* is engaged in the sale of the devices of the licensed patent.

Unlike the *Lockwasher* and *McCullough* cases, neither licensor nor licensees at bar sell *any* devices, goods, wares or merchandise under the questioned license-agreement. Each licensee's sole business and the only purpose for which it was incorporated, is the operation of a single unit or specimen of the patented device (namely one drive-in theatre) and the sale of *admissions* thereto, to members of the public.*

Instead of being a commodity, merchandise or tool to be sold from time to time or to be leased or rented out and to be shipped from place to place, incident to such selling or renting, as in the *Lockwasher* and *McCullough* cases, the device of the licensed-patent at bar is merely the licensee's place of business, built *in situ* and at all times retained *in situ*.

Since the licensees at bar (and virtually all theatre owners and operators in the drive-in theatre industry as a whole) are merely liability-limiting straw corporations reflecting and corresponding to the capital invested in and the ownership and operation of only *one* unit of the patented device, namely, one drive-in theatre, therefore unless the questioned license-agreement by its terms, or by inescapable operation of law, fastens the supposedly competition-suppressing limitations or restrictions also

* Some drive-in theatres (and perhaps also respondents' drive-in theatres) sell refreshments and food items to their patrons, but such sales are not under or in any way touched upon by the license-agreement in question, and respondents have not alleged any such sales of refreshments or food nor have they contended that such sales have any bearing upon their defense of "patent-misuse".

upon stockholders of such licensees and/or upon *other* corporations which such stockholders may form, the questioned contract-provisions at bar cannot, *as a matter of fact,* have any patent-monopoly-enlarging or any competition-suppressing effect, even if the words "any drive-in theatre not licensed by licensor" in the questioned contract-provision are construed (contrary to the allegations of the amended complaint) to comprehend not only infringing drive-in theatres which such contract-language obviously covers and was intended to cover, but also non-infringing outdoor motion-picture exhibition places in which the motion-picture is viewable from the seats of automobiles driven thereinto.

Respondents have not contended below that their stockholders are either bound or in any way effected by the questioned contract-provision at bar.

Paragraph 5 of the questioned license-agreement provides that licensee may build an unlimited number of additional drive-in theatres within the stated geographic area, but as a condition precedent to the building of such additional drive-in theatres, the licensee (or its assignee under paragraph 17 of the license-agreement at R. 80 or paragraph 9-a of the main agreement of Exhibit 3 at R. 73-4) is required to enter into a separate license-agreement just like the license-form of Exhibit 3A.

Respondents have not alleged or contended that petitioner ever refused to execute any additional license-agreements requested under *paragraph 5,* or that petitioner ever withheld its consent to permit licensee to assign such additional license-agreements or any rights under the license-agreement, to any assignee or transferee of licensee's choice under *paragraph 17* (R. 80).

Of course it was to petitioner's interest to have as many drive-in theatres under as many licenses as petitioner's territorially-exclusive licensee (and the latter's assignees) would build within the licensed territory, and the agreement-in-suit (Exhibit 3: R. 69-74) established a minimum requirement as to the number of drive-in theatres

which the territorially-exclusive licensees (Elwood R. Clay's assignees) were *required* to build within the licensed territory and sets up time-limits within which they *must* be built and put into operation and fixed penalties for failure to build and put into operation the number of drive-in theatres and within the time-limits specified and provides that "time is the essence of this agreement. . . ." (R. 70-72).

There were genuine issues of fact which should not have been decided on motion for summary judgment

Upon motions to dismiss for summary judgment, the Court below should not have decided fact-issues, especially after having denied petitioner the right to examine respondents' officers by depositions in respect of these fact-issues:

1) Of what did the agreement-in-suit really consist?

2) What was the understanding of the parties as to the scope of that portion of paragraph 3 of the *un*executed license-form of Exhibit 3-A which is in the words "any drive-in theatre not licensed by licensor"? Was this understood, *at the time when the agreement was entered into,* to cover only infringing outdoor theatres for automobiles, namely, unlicensed drive-in theatres of the patent 1,909,537, as alleged in paragraph 29 of the unanswered, verified amended complaint (R. 56), or was it understood *also* to comprehend non-infringing theatres of the general class?

3) Had paragraph 3 of the *un*executed license-form of Exhibit 3-A been accepted by respondents and, if so, had it at any time thereafter been disavowed or repudiated by them or waiver by petitioner?

4) Had the questioned paragraph 3 of the license-form of Exhibit 3-A ever (in fact) had any restraining influence upon competition during the many years such contract-provision is claimed by respondents to have been in force or during the period the same contract-provision

was present in still earlier licenses, as in *Park-In Theatres, Inc.* v. *Loew's Drive-In Theatre, Inc.**?

5) Had there in fact been any enlargement of the patent monopoly, as gleaned from the actual impingement or impact of the contract-provision upon the industry during the ten or more years such contract-provision had been in force?

These fact-issues were not proper to be determined on motion for summary judgment:

Gray Tool Co. vs. *Humble Oil & Refining Co.*, 186 F.2d 365 (5 Cir.) decided January 19, 1951.

Westinghouse Electric Corp. vs. *Bulldog Electric Products Co.*, 179 F.2d 139; (84 PQ 115) 4 Cir.

Peckham vs. *Ronrico*, 171 F.2d 653 (CCA-1).

As pointed out in *Gray Tool Co.* vs. *Humble Oil & Refining Co., supra,* it is a *misuse of summary judgment procedure* in patent suits to resolve fact-issues on motion for summary judgment:

> "*The defense of misuse of patents,* like other unclean hands defenses, *is not* as defendant seems to think, *a matter of the letter of bare facts: it is a matter of their spirit, the intent with which they are done. A judge may not, on motion* for summary judgment, *draw fact inferences as to plaintiff's purpose or intent* in respect to obtaining a monopoly. *Such inferences may be drawn only on a trial.*" (186 F.2d 365, 367).

In *Gray* v. *Humble, supra,* the motion for summary judgment had been preceded by extensive depositions under Rule 26 and yet the Fifth Circuit reversed the summary judgment saying:

> "The case as a whole made by the pleadings, the evidence and the exhibits in the seven volume record, and by plaintiff's affidavits in opposition to the motion, is

* See footnote on page 23, *supra,* and footnote 2 on page 6, *supra*

peculiarly one for determination, not by summary judgment, but on the merits and by trial, for decision 'on oral testimony, with the opportunity to examine and cross-examine witnesses in open court . . . often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system,* including for many years, in this country, trials in equity." (186 F.2d 365, at 367)

In the case at bar, as in *Gray* vs. *Humble, supra.*

". . . defendant is not merely an infringer of the patents but an arch contriver in doing so, in that, under the seal of confidential disclosures, it deliberately went about to obtain information to more effectively pirate plaintiff's invention[1], with the result that, through the use of the information plaintiff has furnished it, defendant has itself obtained a monopoly in the field covered by plaintiff's patents.[2]

"It will not do to say, as appellee did below and does here, that this, as well as all else that plaintiff brings forward and relies on, is immaterial. If what plaintiff charges is true, defendant, in seeking a continuing immunity from suit, while it blithely continues to practice the arts of piracy, and in making broad its phylacteries, while pointing its finger at plaintiff as unclean, is not a Daniel come to judgment, but Satan quoting scripture to his purpose."

"In such a situation, the court, instead of hurrying plaintiff out of court, his charges unheard, should have proceeded with the trial . . ." (186 F.2d 367-8)

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* Citing *Coleby* vs. *Klune,* 178 F.2d 872, 873 (2 Cir.); *Doehler* vs. *U. S.,* 149 F.2d 130, 135 (CA-2); *Kennedy* vs. *Silas Mason,* 334 U. S. 249, 256-7; *Sartor* vs. *Ark. Natural Gas Corp.,* 321 U. S. 620, 627; *Peckham* vs. *Ronrico,* 171 F.2d 653, 657 (1 Cir.); *Whitaker* vs. *Coleman,* 115 F.2d 305, 306-7 (5 Cir.).

[1] See paragraph 2 of the license-form (R. 76), and paragraph 24 of the amended complaint (R. 54).

[2] See paragraphs 9, 10, 12, 20 (a to c), 21 to 28 inclusive, 35 to 38 inclusive, 52, 55 and 56 of the *amended complaint* (R. 47-64).

"On that trial the defendant could have offered its evidence on the issue of misuse, and plaintiff could have offered its controverting evidence, showing its method of conducting its business, and *whether or not as a matter of fact and intent,* and not merely of accusation, it has used, or sought to use, the patent privilege wrongfully, to obtain a monopoly, and thereby drive from the field its competitors in the making of standard equipment."

"The principle invoked by defendant and erroneously applied by the trial court is simple and plain, and, as properly applied, sound. The fallacy in defendant's statement, which the court below failed to see, is that, though in most of the cases defendant cited and relied on, the question of misuse was decided upon a hearing as a question of fact, the defendant presented it as though the findings were made as matter of law." (186 F.2d 368)

"What the issue here comes down to is this, that in each case where the misuse of patent principle has been applied, it has been of the essence of its application that, whatever it takes in law, to constitute the misuse, be established as matter of law where the procedure was by summary judgment, or, as a matter of fact where it is by trial." (186 F.2d 369)

"The latest authoritative decision on this question, Linde Air Products Co. *v.* Graver Tank & Mfg. Co., D.C., 86 F.Supp. 191, 167 F.2d 531, and 336 U.S. 271, makes it abundantly clear that the issue of patent misuse tendered by defendant here was one of fact, and that there was no basis in the record for deciding it as matter of law." (186 F.2d 369)

". . . a court of equity should be patient enough to search out and determine the merits of the case. . ." (186 F.2d 369)

In the case at bar, the verified complaint alleges that the phrase "any drive-in-theatre not licensed by licensor"

in the questioned contract-provision at bar was understood and intended to mean *only* infringing drive-in theatres which such phrase obviously comprehends, and respondents have shown nothing contemporaneous with the agreement-in-suit remotely showing that this quoted language was intended *also* to comprehend non-infringing automobile motion picture theatres.

The complaint alleges facts from which it is manifest that, irrespective of the meaning of this bit of contract-language, there was no possibility of such contract-language enlarging the patent monopoly or suppressing competition because of the facts peculiar to the industry and the subject matter of the patent, which are without precedent in any prior-decided patent-misuse cases, and the widespread use of non-infringing automobile motion picture theatres shown by respondents moving affidavits only helps to attest the fact that such non-infringing competition has not been suppressed, and nothing brought forth by respondents suggests any cogent mechanism or correlationship between the agreement-in-suit and the building and operation of non-infringing automobile motion picture theatres by which the agreement-in-suit could have any suppressive or deterrent effect upon the widespread building and operation of non-infringing theatres.

In *Automatic Radio Mfg. Co.* vs. *Hazleton Research Corp.* (339 U. S. 827), this Court,

> (in affirming a judgment for royalties under a patent-license against the defense that it was unenforceable because it constituted a misuse of the licensed patent to require the licensee to pay royalties based on its sales even though none of the patents were used)

recognized that the now popular and almost universally interposed defense of "patent-misuse" has itself been widely misused and abused to the great impediment of the orderly and expeditious disposition of patent-infringement suits and royalty-recovery suits, this Court saying:

"We cannot say that payment of royalties according to an agreed percentage of the licensee's sales is unreasonable. Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. We are not unmindful that convenience cannot justify an extension of the monopoly of the patent. (citing cases) But as we have already indicated, there is in this royalty provision no inherent extension of the monopoly of the patent. *Petitioner cannot complain because it must pay royalties whether it uses Hazeltine patents or not.* What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them. *If it chooses to use none of them, it has nevertheless contracted to pay for the privilege of using existing patents* plus any developments resulting from respondent's continuous research. *We hold that in licensing the use of patents to one engaged in a related enterprise, it is not per se a misuse of patents to measure the consideration by a percentage of the licensee's sales.*"[1]

Placing a royalty-burden upon unpatented devices, as in the *Automatic Radio* vs. *Hazeltine* case, is in a very real sense the equivalent of barring the licensee from engaging in the use or exploitation of the unpatented device, because, of course, the licensor in the latter situation could not and would not object to the licensee's engaging in the exploitation of the unpatented device if he paid a royalty thereon the same as he does on the patented device.

It is submitted, therefore, that, even if the blank form of proposed license-agreement of Exhibit 3-A constituted part of the executed agreement of Exhibit 3 and even if paragraph 3 thereof required the licensee to refrain from engaging in the operation of non-infringing automobile-movie-theatres, such an undertaking would not be an un-

[1] of unpatented products

lawful or unreasonable one in view of the exclusive nature of the territorial license and in view of the fact that the licensee was not compelled to discontinue dealing in unlicensed products[2] (as was the case in the *Lockwasher* case, supra), and in view of the fact that nothing has been shown to indicate any domination or possibility of domination of or even influence upon the industry or any possibility of monopoly in automobile-movie-theatres (as was the case in *Lockwasher* and *McCullough* cases, supra).

In this connection, the Court's attention is respectfully called to the fact that, following an extensive trial on the merits, and with all the facts before it, on pretrial depositions and open-court testimony of the defendant's well-informed president, the undertaking of paragraph 3 of Exhibit 3-A was held to be a proper and unobjectionable one in the case of *Park-In Theatres, Inc.* vs. *Loew's Theatres, Inc.* 70 F.Supp. 880 (DC R1);—reversed on other grounds at 174 F.2d 547 (CA-1).

The decisions below would also seem to be in conflict with recent decision in *American Machine & Metals* vs. *De Bothezat Impeller Co.* 180 F.2d 342, 347 (CA-2). certiorari denied June 5, 1950, 339 U.S. 979, because it involved an agreement whereby De Bothezat transferred its business, patents, etc. to American, with the latter having the right to terminate, upon notice;—the agreement calling for return of the patents, etc. to De Bothezat in such case. The agreement provided for the formation of a new company by American to whom American's rights under the agreement would be assigned. The agreement further provided as follows:

> "Metals Corporation further agrees that the New Company will not engage in the manufacture and sale of any products which compete with the Products to be manufactured and sold hereunder."

This restriction is, of course, virtually identical with the District Court's interpretation of paragraph 3 of Exhibit 3-A, in the case at bar.

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[2] because the licensee was to be a theretofore non-existent corporation

The Court in the *American* case distinguished the *Lockwasher* case on the ground that "here something more than a license agreement is involved". So, too, in the case at bar, something more than the mere non-exclusive license of the *Lockwasher* case is involved.

The agreement of Exhibit 3 at bar is an exclusive territorial grant which, since it excludes even plaintiff from practicing the invention in the licensed territory, is in effect a conveyance of an interest in the licensed patent, subject to recapture upon termination (just as in the *American* case).

It is almost universal practice, especially in the appointment of distributors by an automobile manufacturer, to specify that the distributor will not handle the goods of a competing manufacturer and, instead, will devote his entire efforts to increasing the sales of the particular product. It is a matter of common knowledge that every automobile manufacturer acquires a substantial number of patents covering its automobile or parts thereof. Necessarily, therefore, every such agreement between an automobile manufacturer and distributor includes an express or implied license to sell only the *patented* articles of the automobile manufacturer, and, in this respect, is analogous to paragraph 3 of the license-form of Exhibit 3-A in the case at bar.

In no case, of which we are aware, has the validity of such an exclusive distributor agreement ever been successfully questioned. On the contrary, such agreements have been specifically upheld in a number of cases. See, for example, *B. S. Pearsall Butter Co.* vs. *Federal Trade Commission* 292 Fed. 720, 722 (CCA 7); *Moon Motor Co.* vs. *Moon* 29 F.2d 3 (CCA 2); *Kane* vs. *Chrysler Corp.* 80 F.Supp. 360, 363 (DC Del), Ky. Nat'l Gas Corp. *vs.* Indiana Gas & Chemical Corp. 118 F.2d 831, 834 (7 Cir.).

Recognizing the greater duty and obligation resting upon an *exclusive* licensee, the courts have gone so far so to read into exclusive licenses of this type an implied covenant not to compete with the licensed product. Thus, in *Guardino Tank Process Corp.* vs. *Olsson* 89 N.Y.S. 2d 691,

81 USPQ 318, 321 (N.Y.S.Ct., 1949), the Court, in construing an exclusive license for the territory of New York City, stated:

> "In the case at bar, as in the cited cases, the fate of the subject matter of the contract was placed exclusively with the licensee for the purpose of exploitation, and, consequently there was implicit in the arrangement the obligation of the licensee reasonably to exploit and to refrain from competition."

See also to like effect *Mechanical Ice Tray Corp.* vs. *General Motors Corp.* 144 F.2d 720, 725 (CCA 2).

Paragraph In Dispute Never Adopted By Parties.

Paragraph 1 of Exhibit 3 refers to Exhibit 3-A which is incorporated therein by reference. It should be clear from a reading of Exhibits 3 and 3-A (R. 69-82) that the latter was only a blank form of license agreement which was intended to be executed *in futuro* by the separate straw-corporation owners of individual theatres within the exclusive territory.

Exhibit 3-A was never executed and all contractual obligations between the parties were contained in Exhibit 3 alone. This is established by paragraph 25 (a and b) of the Amended Complaint (R. 54-55). Hence, at best, Exhibit 3-A was nothing but an empty gesture, never formalized into a binding agreement between the parties. Despite this fact, the lower Courts held that the provisions of Exhibit 3-A are an integral part of Exhibit 3.

Even if the blank form of Exhibit 3-A is considered as an attempt by petitioner, in 1940, to prevent the exclusive licensee from engaging in the operation of non-infringing theatres, it is clear that respondents have repudiated the provision and that petitioner has waived the provision long ago and that it no longer constituted a defense to this action to recover royalties due and unpaid under the agreement of Exhibit 3. See *Automatic Radio Mfg. Co.* vs. *Hazeltine Research* 339 U.S. 827.

Even if petitioner had intended in 1940 to prevent its exclusive licensee from engaging in the operation of non-infringing theatres, the fact of the matter is that petitioner never attempted to enforce the provision against respondents or against anyone else while respondents themselves specifically repudiated this provision, along with the remaining provisions of the 1940 agreement, when they discontinued royalty payments in 1943, four years before this suit was filed (paragraphs 46-48 at R. 61-2 and paragraph 28-b at R. 56 of the amended complaint).

Thus, in any event, there has been an effective waiver of paragraph 3 of Exhibit 3-A on the part of petitioner. Under these circumstances the provision could not properly be asserted as a defense in this action to recover royalties due and unpaid under the agreement of Exhibit 3.

Thus, in *Automatic Radio* vs. *Hazeltine Research,* supra, this Court rejected the defense that the agreement there in suit contained an objectionable provision requiring a restrictive notice to be attached to apparatus manufactured under the agreement;—the Court stating:

> "Respondent did not seek to have this provision of the agreement enforced, and the decree of the District Court does not enforce it. **It may well have been a dead letter from the beginning, as indicated by the fact that,** as petitioner averred in its answer, **it has never observed this provision of the agreement.** Thus, it is doubtful that the legality of this provision could be contested, even assuming that the issue was properly raised, which respondent disputes.
>
> . . . . . .
>
> "Since this provision of the agreement was made for the benefit of respondent, it could voluntarily waive the provision. Westinghouse Electric Corp. *v.* Bulldog Electric Products Co., 179 F.2d 139, 145, 146."

It is therefore submitted that the lower Courts erred in holding that paragraph 3 of Exhibit 3-A constituted a firm undertaking between the parties and was binding upon

respondents, so as to amount to misuse of the licensed patent sufficient to justify refusal to award royalties due under a contract from which respondents have derived substantial benefits, without compensating petitioner therefor.

At the least, there was a genuine issue of fact—of what did the agreement between the parties consist—which should have required denial of respondents' motions for dismissal and summary judgment. Allegations of a complaint should not be ignored on a motion for summary judgment.

Paragraph 3 of Exhibit 3-A erroneously misconstrued by lower Courts.

Even if we assume that paragraph 3 of Exhibit 3-A was an integral, binding provision of the agreement between the parties, yet there remained the question of how it is to be construed. Petitioner contends that instead of referring to unpatented structures, as held by the lower Courts, it has reference only to the type of drive-in theatre covered by the licensed patent. In effect, this provision was nothing more than an innocuous commitment on the part of the licensees that they would not assist in any infringement of the licensed patent. Petitioner's position is supported by the record. Thus the reference in paragraph 3 to "drive-in theatre" could have meant only the patented theatre—and not unpatented structures, as erroneously held by the lower Courts (R. 50-1 & ¶ 29 at R. 56).

Therefore, we submit that even if paragraph 3 of Exhibit 3-A was an obligation of the parties, its only purpose was to prevent respondents from participating in unlicensed infringement of the patent. One should not, of course, be allowed to encourage the violation of a patent at the same time as he possesses a license thereunder.

That, *long subsequent* to the execution of the agreement, the phrase "drive-in theatre" may have been used by third persons in a broader sense, to include the so-called "flatties" which are outside the scope of the patent, is wholly irrelevant on the question of the interpretation of

the agreement, since the latter is determined solely by the intent of the parties **at the time.**

The lower Courts interpreted paragraph 3 of the blank form of proposed license of Exhibit 3-A as requiring the proposed licensee not to engage in the operation of any outdoor motion picture theatre for automobiles, whether or not coming within the scope of the licensed patent, by construing the expression "drive-in theatre" as a generic or descriptive expression applicable to all outdoor motion pictures for automobiles, regardless of type or construction. This ruling or fact-finding flies in the face of the allegations of paragraph 13-15 of the verified and uncontroverted Amended Complaint (R. 49-50) which are to the effect that *no* outdoor motion picture theatre for automobiles was known prior to the invention of Hollingshead patent 1,909,537, that the inventor Hollingshead coined the term "Drive-In Theatre" and that in the patent as well as in the contract-in-suit the term or phase "drive-in theatre" was intended to mean only the particular outdoor motion picture theatre covered by patent 1,909,537 (R. 56).

There is nothing whatever in the record to show that the expression "drive-in theatre" was merely a descriptive or generic term *in 1940 when the agreement of Exhibit 3 was executed.*

There is certainly nothing against public policy in requiring one who has entered into a contract to pay royalties under a patent not to engage in secret infringing operations without accounting to the licensor therefor.

If by reason of the widespread popularity of the invention of the patent-in-suit and/or by reason of the unauthorized (rightful or wrongful) appropriation of the phrase "drive-in theatre" by others to designate the aforesaid "flatties", the phrase "drive-in theatre" was gradually or suddenly converted (in 1946) from its 1932-1940 *status* of designating only the outdoor motion picture theatre for automobiles covered by the patent in suit, to the *status* of a generic phrase comprehending any and all outdoor motion picture theatres for automobiles irrespective of the whether they embodied the invention of the patent in suit, such change of *status* of the phrase "drive-in

theatre" subsequent to the date of the contract in suit, should have no valid bearing upon the question as to what the parties intended to comprehend by the term "drive-in theatre" in paragraph 3 of the unexecuted license-form of Exhibit 3-A.

The intent of the parties should govern the interpretation to be placed upon this provision of the license-form, and no subsequent (1946) *change of status* of the phrase "drive-in theatre" should be used (as was apparently done by the lower Courts) to expand the scope of this provision of the license-form so as to give it an interpretation which would make it illegal;—whereas the way in which the parties used the phrase of this provision of the license-form would be illegal. Such use of a post-contract change-of-status of a bit of coined contract-language would be in the nature of *ex post facto* decisional law,—made the worse by being based on subsequent events* not of the party's making, occurring long after the contract was entered into.

To say the least, paragraph 3 of Exhibit 3-A is capable of interpretation in a manner which would render it wholly unobjectionable, rather than in the allegedly objectionable interpretation adopted by the lower Courts. Where a contract is capable of two interpretations, one of which would raise serious doubts as to its legality, the latter interpretation should *not* be adopted, as indicated in *American Machine & Metals* vs. *De Bothezat,* supra:

> "In addition were appellant's construction to be given the contract, serious doubts would arise as to its legality.
>
> . . . . . .
>
> While we do not decide that an agreement by appellee not to compete after termination would be illegal, we do think that the doubts as to its legality above expressed at least to some extent strengthen the conclusion we have previously reached, after the canon of construction that the court will presume that the par-

* the unauthorized (though perhaps rightful) appropriation and application of the coined phrase "drive-in theatre" to "flatties", in 1946

ties did not intend to make an unlawful contract." (180 F.2d 347)

Doctrine of Lockwasher and McCullough cases inapplicable to "hollow shell" licensees

When the legal fiction of corporate entity is placed around each investment required for building and operating a drive-in theatre, and the licenses to be entered into are to be entered into only with such *one-theatre corporations,* any restriction which might otherwise be a restraint upon competition, is inherently non-restraining because such corporate entity is nothing more than the investment corresponding to the one licensed theatre, and such investment, in and of itself, is already fully employed in the drive-in theatre of the patent-in-suit and could not possibly be any longer employed to build and operate some other unpatented kind of outdoor motion picture theatre for automobiles.

Therefore, in the case at bar, unlike the situation in the *Lockwasher* case and unlike the situation in the *McCullough* case, the patent owner was not licensing and was not intending to license corporations having existing production facilities, but was licensing or intending to license only corporations which were to be formed to become the title holders for the individual theatres to be licensed under petitioner's patent (see paragraphs 22 & 23 of Amended Complaint, at pages 52-53 of Record).

The real parties in interest, namely stockholders, not being the licensees or the intended licensees, could take the gains or profits from any of the licensed drive-in theatres and, with such profits, and with any other funds, build as many outdoor motion picture theatres for automobiles not covered by plaintiff's patent as they might care to build, and nothing in the proposed license agreement of plaintiff's Exhibit 3-A could ever have any restraining effect upon such activities.

Hence, in the case at bar[1], the executed agreement of Exhibit 3 as well as the unexecuted license of the form of

[1] unlike the situations in the *National Lock Washer* case and the *McCullough* case

Exhibit 3-A was *inherently incapable* of "purging the market of competition" and was *inherently incapable* of restraining the building, operation or use of competing unpatented structures, because all that was required, was for defendants' stockholders[2] to form as many more corporations as they cared to form, and through each of such other corporations to build and operate one or many competing unpatented structures.

Certainly, if the petitioner had intended to accomplish a restraining effect like that which the lower Courts attributed to paragraph 3 of the license agreement form of Exhibit 3-A, petitioner would have *had to* make such license agreement with each and every individual stockholder of the various corporations which own the individual licensed drive-in theatres.

Even if petitioner had done so, the restraining effect which the lower Courts attributed to paragraph 3 of the license agreement form of Plaintiff's Exhibit 3-A would have been *de minimis* unless such individual stockholders, even collectively, represented some appreciable or significant part of the theatre-building capacity of the motion picture exhibition industry, which they did not.

These and other matters are fact-questions which should have been decided only upon the trial or upon depositions before trial.

Conclusion

Wherefore your petitioner prays that its petition be granted; that a writ of certiorari be issued and the case reviewed; and that the judgment of the Court of Appeals (and the summary judgment and order of dismissal of the District Court, which it affirms) be reversed.

Respectfully submitted,

PARK-IN THEATRES, INC.,
petitioner

by
LEONARD L. KALISH
ARTHUR G. CONNOLLY
its attorneys

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[2] namely the financial interests represented by Elwood Roger Clay the signatory to the agreement of Exhibit 3